that a long continued open user of a switch track by the defendant was more reasonably explained on the ground of permission because the plaintiff, across whose lands the switch track in part was located, had during the same time also been using the track. See also *Barber* v. *Bailey*, (Vt.) 84 Atl. 608. R. W. A.

TRUSTS AND COMBINATIONS BASED ON PATENTS.—The extent to which public attention has been directed to the patent laws in the last year caused the recent case of the *Standard Sanitary Mfg. Co. et al* v. *United States*, (1912) 33 Sup. Ct. 9, to be of more than ordinary interest. Suit was brought by the government against one Wayman, sixteen corporations engaged in the manufacture of enameled ware, and officers of these corporations, charging that said defendants had entered into a combination and conspiracy in restraint of trade contrary to the Act of July 2, 1890 (26 STAT. AT L. 209, ch. 647, U. S. COMP. STAT. 1901, p. 3200). In 1908, defendant Wayman, who was secretary of the Association of Enamelled Ware Manufacturers, obtained control of what was known as the Arrott patent on a device for applying the enamelling powder to the iron, which was a great improvement over former methods. This patent had formerly been controlled by the Standard Company. Wayman drew up a license agreement which was to become effective when eighty-three per cent. of the manufacturers subscribed to it, and submitted it to the manufacturers. The license agreement provided that the licensee should be allowed to use the Arrott patent; that he should pay royalties, eighty per cent. of which should be refunded at stated periods if the agreement were strictly observed; that he should sell only to jobbers who signed the jobber's agreement; and that he should abide by the prices, conditions for selling, discounts, etc., fixed by the licensor. The jobber's agreement provided that he should handle only enamelled ware manufactured by licensed manufacturers, and should abide by the re-selling prices fixed by the licensor. A rebate system was provided and breach of the agreements forfeited rebates and the jobber's right to purchase from any licensed manufacturer. Eighty-five per cent. of the manufacturers and ninety per cent. of the jobbers of the country signed the agreements.

The trial resulted in the entry of a decree in favor of the government, from which the defendants appealed, maintaining: (1) that the form of the license followed precedents and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it or to grant it on such terms as he may choose; (2) that Wayman's demand was legal and that therefore payment of the price could not be illegal. The court held that the combination constituted a restraint of trade contrary to the Sherman Law, saying, "The agreements clearly transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law." And comparing the case to *W. W. Montague & Co.* v. *Lowry*, 193 U. S. 38, the court said: "The added element of patent in the case at bar cannot confer immu-

nity from like condemnation. And this we say without entering into consideration of the distinction of rights for which the government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give, any more than any other rights, a universal license against positive prohibitions. The Sherman Law is a limitation of rights—rights which may be pushed to evil consequences and therefore restrained."

A study of the cases which led the defendants to believe that they were protected by the patent laws is interesting, and seems to show some basis for their belief. In *Heaton Peninsular Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288, plaintiff company, which controlled a patent on a machine, sold the machines with a label affixed, stating that the machine was to be used only with staples furnished by the plaintiff company. Defendant company, with knowledge of this restriction, sold staples to a purchases of the machine to be used with it. This was held to be an infringement of plaintiff's patent and an injunction issued to enjoin it as such. This case has been followed by a great many others in the Circuit Courts and Circuit Courts of Appeals, and in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, the United States Supreme Court affirmed the doctrine, so that it is now firmly established. The cases on this subject are collected and discussed in 10 MICH L. REV. 608. *In Victor Talking Machine Co.* v, *Fair,* 123 Fed. 424, plaintiff, who controlled a patent on a phonograph, sold the patented article to defendant bearing a label stating that it was not to be resold at less than a certain price. Defendant sold it at less than the prescribed price. It was held that defendant had infringed plaintiff's patent and injunction was granted to restrain such infringement. This doctrine was affirmed in *National Phonograph Co.* v. *Schlegel,* 128 Fed. 733; *Fair* v. *Dover Mfg. Co.* 166 Fed. 117, by federal appellate courts, and by many cases in the lower courts, and seems to be the settled rule of the federal courts. In *Rubber Tire Vehicle Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358, plaintiff controlled certain patents. It licensed defendant and other manufacturers to use the patents. The license agreements provided that only certain prices should be charged for the patented article, that royalties should be paid, and that the output of each factory should be regulated by the licensor. Plaintiff sued defendant, one of the licensees, for royalties due by the agreement, and defendant maintained that the agreements were contrary to the Sherman Law. The court held that "use of a patented article cannot be had except on the inventor's terms, and a requirement that a licensee join other licensees in a combination or pool to control the prices and output of an innocuous patented article is not in violation of the Sherman Act." The same rule is stated in *Indiana Mfg. Co.* v. *J. I. Case Threshing Machine Co.*, 154 Fed. 365; *Goshen Rubber Works* v. *Single Tube A. & B. Co.*, 166 Fed. 431; *U. S. Consolidated Seeded Raisin Co.* v. *Griffin and Skelley Co.*, 126 Fed. 364. The only federal case holding contrary to the rule as above stated seems to be *National Harrow Co.* v. *Hench,* 83 Fed. 36, in which it was held that the the fact that the property involved was covered by patent did not confer on the owners of

several distinct patents the right to combine. *E. Bement & Sons* v. *National Harrow Co.,* 186 U. S. 70, which is sometimes cited in support of the above proposition, involved a contract with only one manufacturer and the court expressly refused to state what might have been the holding if license contracts had been made with more than one.

By the above cases, it seems to have been established in the federal courts that the owner of a patent could require that only materials furnished by the licensor could be used with the patented article, thus allowing the licensor to control an unpatented article by virtue of his ownership of a patent on a different article; that the owner of a patent could sell the patented article and control the re-selling price; and that a combination of manufacturers which, under ordinary circumstances, would be contrary to the Sherman Law, is freed from the control of the statute by virtue of the fact that the article involved is covered by a patent. In the principal case, the court was asked to go further and hold that a combination which controlled an unpatented article is freed from the control of the statute by virtue of the fact that the agreements upon which the combination are based are in the form of licenses to use a patented tool used in the manufacture of the article controlled. The court refused to so hold, and, as shown by the language above quoted from the opinion, indicated that its holding would be the same if the article controlled by the combination were itself patented.

It is interesting to note in this connection that in case of the passage of the proposed patent law submitted to Congress last August, the three doctrines given above as established in the federal courts will be destroyed. The proposed statute provides that labels or agreements controlling the re-selling price or use of the patented article shall be of no effect, and that any patent used as a part of any combination in restraint of interstate commerce may be condemned in the manner provided for the seizure and condemnation of goods illegally imported. R. L. M.

ADMISSIBILITY OF UNANSWERED PLEADINGS AGAINST THE PERSON CALLED UPON TO ANSWER THE SAME.—A peculiar problem as to the effect of admissions made in the trial of another cause was recently presented before the Supreme Court of Missouri in the case of *Miller* v. *Journal Company,* 152 S. W. 40. The plaintiff sued the defendant newspaper company for libel. Upon cross-examination of the plaintiff, and with the intent to impeach him, the defendant asked as to the former's marital relations. The plaintiff then introduced several witnesses who testified that his marital conduct was good. Thereupon the defendant offered in evidence the petitions in two different divorce suits brought by the plaintiff's first wife against him. In one of the suits the plaintiff had been served with summons, but had made no appearance nor contest, and judgment was not entered. The court favored the admissibility of the petition and in discussing the question gave utterance to the following observation: "We find no case where this question has been raised on a record where the default was not entered. But reason is the soul of the law, and the law should be co-extensive with the reason for it. And